

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SERVICE BUS CO., INC. : DECISION
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period June 1, 1981 :
through August 31, 1984. :
:

Petitioner, Service Bus Co., Inc. 845 Nepperhan Avenue, Yonkers, New York 10703, filed an exception to the determination of the Administrative Law Judge issued on May 11, 1989 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through August 31, 1984 (File No. 802263). Petitioner appeared by Sidney J. Leshin, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

Petitioner did not submit a brief on exception. The Division submitted a letter in lieu of a brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly determined that petitioner was not entitled to a refund or credit for taxes paid on the sale to or use by petitioner as an omnibus carrier of any omnibus, and of parts, equipment, lubricants, motor fuel, diesel motor fuel, maintenance, servicing and repairs purchased and used by petitioner in the operation of its omnibus business.

II. Whether the estimated assessment calculated by the Division was authorized and proper.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioner, Service Bus Co., Inc., was in the transportation business providing charter bus service during the period in issue, June 1, 1981 through August 31, 1984 (the "audit period"). On June 4, 1984, the Division of Taxation sent petitioner an "appointment letter" which requested a field audit appointment date of June 21, 1984 and requested that all the books and records of the business be produced for the period June 1, 1981 through May 31, 1984. A field appointment was finally held on July 19, 1984 but very few books and records of the business were made available. In fact, despite numerous attempts and requests for said books and records, the only records ever produced to the Division were annual sales tax returns, Federal income tax returns, depreciation schedules, a cash receipts journal, a check disbursements journal and the general ledger through December 31, 1982. Except for five purchase invoices, not produced until March of 1988, following formal hearing, no purchase invoices were ever produced to the Division for its review. The five invoices produced were issued by Universal Coach Parts, Inc. of Edison, New Jersey, collectively totalling \$719.88.

Although requested, the Division never received a copy of the certificate of public convenience and necessity for the operation of a bus line purportedly run by petitioner between points in Westchester County and New York City. However, subsequent to formal hearing, Service Bus submitted an order of the Department of Transportation ("DOT"), dated November 29, 1982, which extended the temporary certificate of public convenience and necessity for one Service Transit Corporation from November 15, 1982 until November 15, 1983. The relationship between Service Transit Corp. and petitioner was not established. It is noted that the DOT order issued to Service Transit Corp. on November 29, 1982 was assigned case number 29652. An appendix attached to the copy of the order submitted into evidence with petitioner's brief as Exhibit "B" set forth the route or bus line covered by the original certificate

but the case number on the appendix was 30223. No explanation was offered for the discrepancy between the case numbers.

When the Division of Taxation made its examination of the books and records supplied by petitioner, it was able to discern that petitioner provided transportation service to two school districts, charter trips and express bus service between Westchester County and New York City. An examination of the sales tax returns filed by petitioner indicated that petitioner had no taxable sales and therefore no further tests of sales were conducted. Instead, the Division did a test of all expense purchases made during the audit period by examining petitioner's general ledger and cash disbursements for six quarters in the period June 1, 1981 through November 30, 1982. Actual expense purchases for that period were taxed in their entirety and an average of the six quarters was calculated and applied to the remaining quarters in the audit period. Added to each of the quarters was the expense for bus leasing on which no tax had been paid. The total purchases subject to tax, expense purchases and bus leasing expense, were added together for each quarter and the appropriate tax rate applied.

On April 3, 1985, the Division issued to Service Bus a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth a total tax due of \$122,522.20 and interest of \$28,024.39, for a total amount due of \$150,546.59 for the period June 1, 1981 through August 31, 1984.

OPINION

In the determination below the Administrative Law Judge decided that petitioner was not entitled to a refund or credit for taxes paid on the sale to, or use by, it as an omnibus carrier of any omnibus, and of parts, equipment, lubricants, motor fuel, diesel motor fuel, maintenance, servicing and repairs purchased and used by petitioner in the operation of its omnibus business. Additionally, it was determined that the Division's resort to external indices was only proper for the period June 1, 1981 through May 31, 1984 as the request for records was limited to such period. For this period, the Administrative Law Judge concluded the Division had properly determined tax due from petitioner.

On exception petitioner contends that it did operate an omnibus line for its affiliate, Service Transit Corp. (hereinafter Service Transit), which entitles petitioner to a credit for sales tax on all purchases made to operate said bus line. Additionally, petitioner argues that there should be a reaudit of its records with an allowance given on an adjusted basis for evidence of payment of sales tax.

In response the Division relies upon the determination of the Administrative Law Judge. Specifically, the Division supports the conclusion that petitioner neither established that it was an omnibus carrier nor established a connection between itself and Service Transit sufficient to prove that petitioner was the holder of a Department of Transportation temporary certificate of public convenience and necessity. Further, the Division also agrees that petitioner is not entitled to any credit of sales taxes where its books and records do not support such a conclusion. Lastly, the Division argues that petitioner's request for a reaudit should be denied in light of the fact that petitioner has already been afforded a full opportunity for review of its records and that there is no indication that there would be new documentary evidence to review.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1119(b) provides that a refund or credit shall be allowed for certain taxes paid pursuant to Tax Law § 1105(a), (c) or Tax Law § 1110 on the sale or use by an omnibus carrier of any omnibus, and of parts, equipment, lubricants, motor fuel, diesel motor fuel, maintenance, servicing or repairs purchased and used in the operation of any such omnibus by such carrier. As a condition to obtaining such refund or credit Tax Law § 1119(b) requires that "such omnibus carrier must provide local transit service in this state and operate pursuant to a certificate of public convenience and necessity issued by the commissioner of transportation of this state or by the interstate commerce commission of the United States or pursuant to the contract, franchise or consent between such carrier and a city having a population of more than one million inhabitants, or any agency of such city" (see also, 20 NYCRR 534.4). As a result, we must determine whether petitioner has met the criteria of Tax Law § 1119(b) to be entitled to the refund or credit provided by such section.

A review of the facts indicates that petitioner has not provided proof that it was an omnibus carrier within the meaning of Tax Law § 1119(b). The record before us merely contains an order of the Department of Transportation, dated November 29, 1982, which extended the temporary certificate of public convenience and necessity for one Service Transit Corporation from November 15, 1982 until November 15, 1983. Petitioner would have us accept this document as proof of its compliance with the requirement of Tax Law § 1119(b) that it operated pursuant to a certificate of public convenience and necessity issued by the commissioner of the Department of Transportation. Even if we were to assume that the order submitted by petitioner would qualify as evidence of an existing certificate of public convenience and necessity for the entire audit period, the complete lack of evidence with regard to the existence of an affiliation between petitioner, Service Bus, and Service Transit prohibits us from accepting this document as proof of petitioner's status as an omnibus carrier. No documentation at all has been provided which pertains to the existence of any sort of relationship between petitioner and Service Transit.

In addition to petitioner's failure to prove that it operated pursuant to a certificate of public convenience and necessity, we find that petitioner failed to submit evidence upon which a percentage could be calculated to determine the proportion that petitioner's claimed vehicle mileage in local transit service bears to its total mileage in New York State (Tax Law § 1119[b]; 20 NYCRR 534.4[a][3], [4], [5] and [6]). Further, petitioner did not establish that the bus line itinerary which it attached to the Department of Transportation order did actually correspond to the order or that petitioner operated an omnibus service on the line described therein. In the absence of any evidence supporting petitioner's claims with regard to such documents, we conclude that petitioner has failed to provide the mileage and route information required by Tax Law § 1119(b) and 20 NYCRR 534.4(a) in order to qualify for the credit claimed. As a result, we conclude that petitioner has not met its burden of proving its entitlement to the credit claimed pursuant to Tax Law § 1119(b) and 20 NYCRR 534.4(1).

The last issue which we will address is petitioner's request that it be granted a reaudit with an allowance given on an adjusted basis for evidence it offered of the payment of some sales tax. Tax Law § 1110 provides that, except to the extent that property or services have already been or will be subject to sales tax, a use tax shall be imposed on every person for the use within this State of any tangible personal property purchased at retail. Tax Law § 1132(c) provides that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of Tax Law § 1105 shall be presumed to be subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect the tax or the customer.

The Division's regulations, at 20 NYCRR 533.2(c), require that "purchase records must provide sufficient detail to independently determine the taxable status of each purchase and the amount of tax due, paid or remitted thereon." Further, 20 NYCRR 533.2(c) requires that "[e]very purchaser must maintain documentation to substantiate any exemption, exclusion or exception claimed on the purchase of any tangible personal property or service." As it is clear that the records made available by petitioner were inadequate to independently determine the total amount of purchases, the taxable status of each purchase and the tax paid on each purchase in that the only records produced were a general ledger through only December 31, 1982, tax returns, a check disbursement journal, depreciation schedule, cash receipts journal, five purchase invoices and a temporary certificate of public convenience and necessity for a company other than itself, the Division of Taxation was within its authority to resort to external indices in order to verify the accuracy of the sales tax returns filed by petitioner (Tax Law § 1138; Matter of Micheli Contracting Corporation v. State Tax Commn., 109 AD2d 957, 486 NYS2d 448). Petitioner claims that a reaudit should be performed so that its liability can be adjusted according to the invoices which indicate payment of some sales tax. In effect, petitioner requests that the amount of sales tax it paid over the audit period be estimated based on the five invoices offered after the hearing. Petitioner argues that such an adjustment would result in a more appropriate estimate of its liability. Petitioner's position would have us reverse the principle in Matter of

Meyer v. State Tax Commn. (61 AD2d 223, 228, 402 NYS2d 74, lv denied 44 NY2d 645, 406 NYS2d 1025) that when the Division is determining the liability of a taxpayer who has not kept adequate records exactness is not required. Petitioner's request would have us allow a taxpayer who fails to keep adequate and complete books and records to estimate its tax liability. We find no authority for such a benefit in the Tax Law or the cases thereunder (Matter of Albanese Ready Mix, Inc., Tax Appeals Tribunal, June 15, 1989; Matter of Raemart Drugs, Inc., Tax Appeals Tribunal, July 8, 1988).

The applicable rule is that the petitioner has the burden to prove by clear and convincing evidence, that the method of audit used or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 446 NYS2d 451). Petitioner cannot sustain this burden with its proposed estimation procedure. Thus, we conclude that the audit was proper as performed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Service Bus Co., Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Service Bus Co., Inc. is denied except to the extent to which it is granted in Conclusion of Law "E" of the Administrative Law Judge's determination; and
4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 3, 1985, is to be modified in accordance with paragraph "3" above but is in all other respects sustained.

DATED: Troy, New York
January 4, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner